APPENDIX A

(Opinion of the District Court for the Northern District of Georgia)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 9487

BILLY ALLEN, *et al*, PLAINTIFFS

vs

ATLANTIC REALTY CO., DEFENDANT

Filed in Clerk's Office, Sep. 14, 1966
Claude L. Goza, Clerk

STATEMENT OF THE CASE

This is an action by some thirty or more employees of the defendant Atlantic Realty Co., seeking unpaid wages under the Fair Labor Standards Act. Plaintiffs are janitors in the Hurt Building in Atlanta, Georgia owned and operated by defendant. Two of the principal tenants in said building are Southern Bell Telephone Company (together with its parent corporation American Telephone and Telegraph Company) and Travelers Insurance Company. Plaintiffs contend that the aforesaid two tenants were engaged in commerce and that plaintiffs were also engaged in commerce. This ground, however, is not relied upon with as much fervor as plaintiffs' contention that the aforesaid tenants were engaged in the production of goods for commerce, and that the plaintiffs were engaged in activities which were closely related and directly essential to the production of goods for commerce.

This Court is ruling that the two tenants above named were themselves engaged in commerce, but that plaintiffs were not engaged in commerce. Primarily this Court is ruling that neither of said tenants were engaged in the production of goods for commerce and that such papers as were produced by said tenants and shipped in commerce constituted only intra-company transactions and that the activities of plaintiffs were not closely related to, or essential to, the production of goods for commerce.

FINDINGS OF FACT

(1) Defendant Atlantic Realty Co. during the period of time alleged by plaintiffs was the owner and operator of the Hurt Building in Atlanta, Georgia. Approximately seventy-five per cent of the space in said building was rented to Southern Bell Telephone Company and American Telephone and Telegraph Company, and additional space was rented to Travelers Insurance Company. The remaining space was rented or leased to various individuals and corporations. Plaintiffs were employed by defendant as janitors who serviced the space leased by the aforesaid two tenants.

(2) While the evidence as to the exact duties performed by plaintiffs as such janitors is rather meager, this Court finds that they did perform the services generally performed by janitors for office buildings.

(3) The Court finds that the aforesaid two tenants during the applicable period were engaged in commerce, and there seems to be no dispute on that issue. However, there is no evidence in the case that the plaintiffs as janitors were themselves engaged in commerce, and this question will be more fully discussed under the Conclusions of Law.

(4) The principal issue in this case is whether or not Southern Bell Telephone Company was engaged in the production of goods for commerce. This Court finds that

it was not so engaged. A brief summary of its activities, relied upon to show such production, is the following:

(a) Disability checks for employees in eight other states were prepared in the Hurt Building and sent to vice-presidents in eight other states. Reports were likewise prepared and sent to other states, along with letters and films, and instructions. These articles were reproduced, TWX messages were sent interstate on tape. Billboards, posters, advertising cards, signs for trucks, inserts to be included in bills to customers, and promotional literature in telephone books were shipped in interstate commerce.

(b) Almost without exception, all of the above literature was produced under contract by independent printers and mailed by such printers from their place of business. Said tenant did, however, prepare and mail from the Hurt Building at irregular intervals certain papers prepared by Zerox or other similar machines. At no time did said tenant prepare in the Hurt Building any form of literature, or anything else, or ship the same for any other purpose than to supply agents and employees of its own, and none of such things were prepared or shipped for profit. As to any matters which were multigraphed in the Hurt Building and shipped across state lines, same being spasmodic, no dates are given and the amounts are minuscule.

(5) The only other tenant in the Hurt Building contended by plaintiffs to be in the production of goods was Travelers Insurance Company. This office did entirely an intrastate business with the exception of rare instances where one of their agents had a client living outside of the state and the client applied for insurance from the Hurt Building office, which was furnished. No production of goods existed at all.

(6) Many other details could be recited but the Court feels it unnecessary. This Court finds that none of the plaintiffs in this case were engaged in commerce, and

that neither of the tenants referred to were engaged in the production of goods for commerce, and that none of the plaintiffs performed any service related to production of goods for commerce.

CONCLUSIONS OF LAW.

(1) This Court has jurisdiction over this action. *28 U.S.C., § 1347; 29 U.S.C., § 201 - 219.*

(2) Defendant owns and manages the Hurt Building wherein Southern Bell Telephone Company and Travelers Insurance Company lease the major part of the space.[1] There are other tenants pursuing a great variety of enterprises.

> "Indisputably, the building is devoted exclusively to offices, and no manufacturing is carried on within it. The respondents are maintenance employees of the building, . . . Obviously they are not 'engaged in commerce.'" *10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, at p. 581.

(3) Regardless of all other considerations it seems clear to this Court that Southern Bell Telephone Company was not engaged in the production of goods for commerce. That issue is definitely settled by the court in the case of *Billeaudeau* v. *Temple Associates*, 213 F. 2d 707 (5 Cir.). In that case the Court stated in part as follows:

> ". . . the exchange of documents between the home office in Texas and the construction office in Louisiana is not commerce as defined by the Act. Commerce has no application to the internal affairs of appellee. Commerce, as defined in the Act, does not include commerce with oneself . . . Moreover, the documents described do not come within the Act's definition of 'goods' . . . it can hardly be said that it includes the payroll records and the time sheets of

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[1] See *Tobin* v. *Girard Properties, Inc.*, 206 F.2d 524 (5 Cir.).

the company, prepared by that company for its own use."

Plaintiffs' counsel cites several cases involving documents wherein the Court held they were goods produced in commerce. Thus, in a ruling by Judge Sloan of this Court (Thomas vs. Associated Cleaning Contractor, 13 Wage Hour Cases, 777) it was ruled that reports and tariffs printed in a building and sent in commerce to persons who were buying the same constituted goods in commerce. The same ruling was made as to Retail Credit Company which printed reports and mailed them to customers in commerce.

The same situation existed in the case of Beneficial Finance Company vs. Wirtz, 346 F. 2d 340. Also, in the case of *Public Building* vs. *Goldberg*, 298 F. 2d 367, Maintenance employees were held to be performing services essential to production in commerce where there was involved the producing and mailing of checks to various individuals in other states. That case made reference to "a building devoted to the production of goods for commerce."

Many other cases are cited by counsel for both sides; they have been studied by this Court and their contents argued to the Court. However, there are no rulings in any of them which to this Court would appear to change the rulings herein made.

(4) Plaintiffs not having made out their case as alleged, defendant is entitled to the entry of a Judgment for costs which the Clerk of this Court is directed to enter.

This the 14th day of September, 1966.

FRANK A. HOOPER
FRANK A. HOOPER
United States District Judge.

APPENDIX B

(Opinion and Judgement of the United States Court of Appeals for the Fifth Circuit)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24356

BILLY ALLEN, ET AL, APPELLANTS

versus

ATLANTIC REALTY COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Georgia.

(October 23, 1967.)

Before TUTTLE, BELL and SIMPSON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from the dismissal by the trial court of a suit brought by the appellants under Section 16(b) of the Fair Labor Standards Act of 1938, as amended,[1] for unpaid minimum wages. The appellants are building service and maintenance em-

[1] 29 U.S.C.A. 201, et seq.

ployees of the realty company that owns the Hurt Building in the City of Atlanta and leases space to Southern Bell Telephone & Telegraph Company in Atlanta, Georgia, to house its headquarters and general offices. The trial court found that approximately 75% of the leaseable space of this building was utilized by Southern Bell and its "parent" company, American Telephone & Telegraph Company during the period in controversy. Another 7½% of the space was used by the Travelers Insurance Company, a nationwide insurer, and the remaining space used by miscellaneous tenants.

Since both appellants and appellee agree that the only issue in the case is one of coverage under the Fair Labor Standards Act, that is, whether appellants were engaged "in commerce" or the "production of goods for commerce," as those terms are defined by the law in the cases, we look to see what the latest pronouncement is by this court distinguishing between these concepts. In *Wirtz* v. *B. B. Saxon & Co.*, 5 Cir., 360 F. 2d 457, this court said:

> "it is apparent that the category of employees engaged in the production of goods for commerce is broader than the class of employees engaged in commerce, not only in the number of people who might be expected to be within it, but in the closeness of the relationship between the person and the activity requisite for inclusion. For one to be engaged in the production of goods for commerce within this Act, he need only be engaged in a closely related process or occupation directly essential to production, whereas to be in commerce, one must be in commerce itself. This distinction has been recognized by the courts. '[T]he test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.' Armour & Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118."

We can best describe the activities which the appellants claim requires a finding that the appellants were "in com-

merce" or "in production of goods for commerce" by referring to findings 4(a) and (b) by the trial court. These findings are as follows:

> "(a) Disability checks for employees in eight other states were prepared in the Hurt Building and sent to vice-presidents in eight other states. Reports were likewise prepared and sent to other states, along with letters and films, and instructions. These articles were reproduced, TWX messages were sent interstate on tape. Billboards, posters, advertising cards, signs for trucks, inserts to be included in bills to customers, and promotion literature in telephone books were shipped in interstate commerce.
>
> "(b) Almost without exception, all of the above literature was produced under contract by independent printers and mailed by such printers from their place of business. Said tenant did, however, prepare and mail from the Hurt Building at irregular intervals certain papers prepared by Xerox or other similar machines. At no time did said tenant prepare in the Hurt Building any form of literature, or anything else, or ship the same for any other purpose than to supply agents and employees of its own, and none of such things were prepared or shipped for profit. As to any matters which were multigraphed in the Hurt Building and shipped across state lines, same being spasmodic, no dates are given and the amounts are minuscule."

The record discloses without dispute that the Southern Bell Telephone Company general headquarters offices in the Hurt Building were creative offices, that is to say, they were executive offices, including operations, consisting of commercial, plant, traffic and engineering; marketing; accounting, public relations; legal; personnel; administrative or executive; revenue requirements and treasury. Perusal of the record indicates that there is no doubt that each of the important departments of Southern Bell management in the Hurt Building is responsible for the crea-

tion of programs or "practices" or copy that is used to make up the various kinds of messages that go out either to the eight other state offices or go to the printers to be translated into physical billboards, posters, cards, signs, directories and the *Bell Telephone News.*

It is indicated from the above quotation of the findings of fact in paragraph 4(b) that the trial court was preoccupied with the fact that the material prepared in the Hurt Building to be sent out was "to supply agents and employees of [Southern Bell's] own, and none of such things were prepared or shipped for profit. In light of this court's decision in *Public Building Authority* v. *Goldberg*, 5 Cir., 298 F. 2d 367, these facts are irrelevant. See also *Beneficial Finance Co. of Wisconsin* v. *Wirtz*, 346 F. 2d 340 (C.A. 7).

Also, the fact that, as stated in the findings by the trial court, a very substantial part of the work done by the management group in the Hurt Building was the creation or approval of ideas, plans, practices, suggestions, reports, statement of policies, etc., that were later sent to printers to be put into more bulky and final form does not prevent the activities being carried on in the creation and approval of the "paper" documents from being production, since the printer would have nothing to print if it were not for the text sent him or approved for him by the administrative officials of the company. We conclude, therefore, that the finding by the trial court that "Neither of the tenants referred to were engaged in the production of goods for commerce" cannot stand.

In order for the appellants to have the coverage which they assert they need only show that they are "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in *any closely related process or occupation directly essential to the production thereof . . .*" (Emphasis added.)

In the *Public Building Authority* case, *supra*, we held that where a building was occupied exclusively by a federal government bureau engaged in the timely issuance of social security benefit checks to claimants in ten Southeastern states, the activities of such employees were within the range of the definition of "production of goods for commerce," citing *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490; *Goldstein* v. *Dabanian*, 3 Cir., 291 F. 2d 208; *Darr* v. *Mutual Life Ins. Co.*, 2 Cir., 169 F. 2d 262, and *Union National Bank of Little Rock, Ark.* v. *Darkin*, 8 Cir., 207 F. 2d 848. We then pointed out that the Supreme Court's decision in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, could not stand for the proposition that, in the adoption of the 1949 amendments to the Fair Labor Standards Act, Congress meant to withdraw from coverage activities such as those we have discussed here. In answering a similar contention made by the owners of the Public Building Authority of Birmingham, we said:

> "We think it is plain that the Zachary case did not mark a withdrawal from the court's previous views as expressed in Kirschbaum Co. v. Walling, 316 U.S. 517, that employees whose work was essential to the maintenance of the building devoted to the production of goods for commerce are covered employees."
>
> "The court distinguished its decision in 10 E. 40th St. Co. v. Callus, 325 U.S. 578, by showing that the building in the 10 E. 40th St. case 'was locally owned, held out for general tenancy, and in fact, tenanted by a miscellany of tenants.' The court made much of the decision between activities which are strictly local in nature and those being national in importance. It cannot be doubted, we think, that on the basis of this distinction, the employees performing services for these government occupied buildings in Birmingham fall clearly within the latter rather than the former category."

We must thus decide whether the Hurt Building, occupied more than 70% by a large interstate telephone com-

pany's head offices engaged regularly in conducting the wide affairs of the company throughout nine Southeastern states and initiating, approving, planning, reproducing for distribution, and ordering out substantial amounts of printed materials to be shipped on mailing lists which were furnished by this headquarters office falls properly within the class of cases represented by *Public Building Authority of Birmingham*, rather than in the class of cases represented by *10 E. 40th St. Co.* v. *Callus*, *supra*, because, "locally owned, held out for general tenancy, and in fact tenanted by a miscellany of tenants."

We have no doubt but that this building is of a kind that falls within the class of *Public Building Authority* rather than *10 E. 40th St.*

We therefore, find it necessary to reverse the judgment of the trial court and remand the case for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24356

D. C. Docket No. CA 9487

BILLY ALLEN, ET AL, APPELLANTS

versus

ATLANTIC REALTY COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, BELL and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Atlantic Realty Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 23, 1967

Issued as Mandate: December 8, 1967